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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 373

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

These two consolidated actions were instituted by the United States in the United States District Court for the Northern District of California to restrain petitioners, the Director of Agriculture and the Attorney General of the State of California, from enforcing California's minimum milk price regulations with respect to milk purchased by distributors from producers (*i.e.*, dairy farmers) and then sold by the distributors in fluid form or as milk products to the

United States for mess hall consumption or resale at base commissaries at three federal military installations located within the territorial limits of California. The purchases by the United States from the distributors were made under contracts entered into by Army and Air Force procurement officers following competitive bidding, as required by armed service procurement regulations and procedures promulgated under 10 U.S.C. 2301, *et seq.* The case was heard by a three-judge court because the complaints raised questions concerning the constitutionality of the California Milk Stabilization Act as applied to the sales from the producers to the distributors and the subsequent resales to the United States.

On November 29, 1960, the district court held that the California Milk Stabilization Act could not be applied to the sales because they were made on lands under exclusive federal control, and because the Milk Act had not been assimilated as federal law. It also held that the State price regulations were unconstitutional since they conflicted with the express federal policy of competitive bidding, and because the statute imposed penalties on the federal government if it purchased milk at less than the established minimums. On April 17, 1961, injunctive orders were entered in accordance with these determinations.

Petitioners took timely direct appeals to both this Court and the Court of Appeals for the Ninth Circuit. On January 15, 1962, this Court entered an order postponing further consideration of the question of jurisdiction on direct appeal under 28 U.S.C. 1253

until the hearing of the case on the merits.[1] *Paul* v. *United States*, 368 U.S. 965. The case was set for argument as No. 19, this Term.

Petitioners have now filed a petition for a writ of certiorari to the Ninth Circuit prior to judgment. The petition is expressly conditioned upon a determination by this Court that it has no jurisdiction over the direct appeal in No. 19. In view of its conditional nature, petitioners suggest that the petition not be acted upon until after the oral argument in No. 19.

The argument in No. 19 is immedately to precede the argument on the direct appeal taken by the United States in No. 81, *United States* v. *Georgia Public Service Commission*. In the latter case, a three-judge district court in the Northern District of Georgia held that the State of Georgia could constitutionally prohibit motor common carriers from contracting with the United States for the intrastate transportation of household goods and personal effects of military and civilian personnel of the United States at rates other than those prescribed by the Georgia Pub-

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[1] As this Court has been advised, since the determination of the district court was made the United States has concluded, as a matter of procurement policy, not to assert immunity from the established California minimum producer prices with respect to milk sold to distributors for processing and ultimate resale to the United States. See Memorandum for the United States in response to Jurisdictional Statement in *Paul* v. *United States* (October Term 1961, No. 239), p. 5. Thus, this Court is called upon to determine only whether California may regulate the price at which distributors may sell milk to the military installations involved.

lic Service Commission. On May 21, 1962, this Court postponed the question of jurisdiction in an order similar to that which it had previously entered in the present case. 369 U.S. 882.

The issue of California's entitlement to enforce its minimum distributor prices on the sales here involved is of substantial importance. We believe, for reasons to be stated in our brief that this Court has jurisdiction of the appeal. In any event the issues will have been thoroughly briefed and argued on both sides and, in our view, should be expeditiously resolved irrespective of this Court's disposition of the jurisdictional question in this case and the Georgia case. For this reason, we do not oppose the granting of the petition for certiorari, in the event that this Court should conclude that it has no jurisdiction under 28 U.S.C. 1253 over the direct appeal taken by petitioners.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1962